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No. 81-2325

In the Supreme Court of the United States

OCTOBER TERM, 1982

ATLANTA GAS LIGHT COMPANY, PETITIONER

v.

UNITED STATES DEPARTMENT OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly concluded that petitioner's claim that provisions of the Powerplant and Industrial Fuel Use Act of 1978 that restrict the use of natural gas in outdoor lighting and regulations issued thereunder are unconstitutionally vague was not ripe for adjudication.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A-2 to A-25) is reported at 666 F. 2d 1359.

JURISDICTION

The judgment of the court of appeals (Pet. App. A-25) was entered on February 1, 1982. The order of the court of appeals denying rehearing was entered on March 22, 1982. The petition for a writ of certiorari was filed on June 21, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On November 9, 1978, the President signed into law five statutes collectively known as the National Energy Act. The Powerplant and Industrial Fuel Use Act of 1978 ("Fuel Use Act" or "FUA"), Pub. L. No. 95-620, 92 Stat. 3289, 42 U.S.C. (Supp. IV) 8301 *et seq.*, a provision of which is at

issue in this proceeding, is one of those five statutes.[1] The Fuel Use Act was enacted, *inter alia*, to reduce the importation of petroleum and increase the Nation's capability to use its indigenous energy resources, to conserve natural gas and petroleum for uses for which there are no feasible alternative fuels, to encourage the greater use of coal and other alternate fuels as primary energy sources, to ensure that adequate supplies of natural gas are available for essential agricultural uses, and to reduce the vulnerability of the United States to energy supply interruptions. Section 102(b), 42 U.S.C. (Supp. IV) 8301(b). The primary strategy chosen by Congress to pursue these goals was to prohibit the use of natural gas and petroleum as a primary energy sources in any new electric powerplant or major fuel burning installation (MFBI) and to require the conversion of existing electric powerplants and MFBIs to coal or other alternate fuels. In addition, to advance the purposes of the Act, Congress restricted the use of natural gas in outdoor lighting. Section 402, 42 U.S.C. (Supp. IV) 8372. It is this last section of the Fuel Use Act, and the regulations promulgated thereunder, that petitioner has challenged.

2. Section 402(a) banned the installation of new outdoor natural gas lighting fixtures effective November 9, 1978. 42 U.S.C. (Supp. IV) 8372(a). In addition, Section 402(b) required the Secretary of Energy to promulgate rules prohibiting natural gas distribution companies, such as petitioner, from providing natural gas service for use in outdoor lighting. 42 U.S.C. (Supp. IV) 8372(b). As originally enacted, the statute provided that the Secretary was to

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[1]The other statutes are the National Energy Conservation Policy Act, Pub. L. No. 95-619, 92 Stat 3206 *et seq.*; the Energy Tax Act of 1978, Pub. L. No. 95-618, 92 Stat. 3174 *et seq.*; the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350 *et seq.*; and the Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 *et seq.*

promulgate the service prohibition rule not later than 180 days after November 9, 1978, and that the prohibition take effect upon promulgation except in the case of gas lights already receiving gas service on the effective date of the Act. Congress established a schedule for phasing out service to outdoor gas lights in place on the effective date of the Act, prescribing varying periods of permissible continued service depending upon the class of outdoor lighting involved. *Ibid.* By Section 1024(a) of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 617, Congress amended Section 402(b) to provide a permanent grandfather exemption from the service prohibition for residential outdoor lighting fixtures that were installed prior to the effective date of the Act and were receiving natural gas service on that date.

Section 402 also directed the Secretary to grant various exemptions from both the installation and service prohibitions. Section 402(c), 42 U.S.C. (Supp. IV) 8372(c). Mandatory and permanent exemptions were to be established for memorial lights or lights of historical significance, and for natural gas outdoor lighting used for commercial purposes, if it was of a traditional nature and conformed to the cultural or architectural style of the area in which the light was located. The Act also authorized the Secretary to grant exemptions from the service prohibition whenever he found that an exemption was necessary to protect the safety of persons or property or necessary to permit the installation of substitute lighting, where compliance with the prohibition would entail substantial expense and would not be cost justified, or where an exemption was in the public interest and consistent with the purposes of the statute. Natural gas distribution companies, such as petitioner, are among those persons specifically authorized by statute to seek discretionary exemptions. Section 402(c)(3), 42 U.S.C. (Supp. IV) 8372(c)(3). Finally, Section 402(e), 42 U.S.C. (Supp.

IV) 8372(e), authorized the Secretary to delegate his responsibility and authority for outdoor lighting to appropriate state regulatory authorities.

3. In May 1979, the Secretary issued the required regulations, including general prohibitions on the installation of outdoor gas lights and the sale of natural gas for use in outdoor lighting. 44 Fed. Reg. 27606 (1979), codified at 10 C.F.R. Part 516. The Secretary's regulations also delegated to the states the Secretary's "full responsibility and authority" for the program. 10 C.F.R. 516.30. The responsibilities delegated included the authority to promulgate regulations needed to carry out the purposes of the statute; the authority to issue orders granting exemptions; the authority to establish criteria to be used in making exemption determinations; the authority to establish procedures for the processing of exemption requests; the authority to establish enforcement policies, criteria and procedures; and the authority to enforce the prohibitions, including the authority to assess civil penalties. *Ibid.* The regulations provide that the delegation of authority to a state may be rescinded if, after notice and opportunity for a hearing, the Secretary finds that a state regulatory authority has failed to comply with any substantial portion of Section 402 or the regulations promulgated thereunder. 10 C.F.R. 516.32.

The Secretary's regulations also provided guidance on exemptions to be used by state regulatory authorities until such time as they chose to exercise their authority to establish their own exemption criteria. 10 C.F.R. 516.40 through 516.47.[2] Although petitioner originally argued that the delegation to the state regulatory authorities was mandatory, the Secretary's position has always been that acceptance of the delegation was discretionary with each state;

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[2]In May 1980, these guidance regulations were amended in respects not material to this litigation. 45 Fed. Reg. 35206 (1980).

that point was made explicit in a recent amendment to the regulations. 47 Fed. Reg. 23436, 23438 (1982), to be codified at 10 C.F.R. 516.30. Of the nation's public utility regulatory authorities only the Texas Railroad Commission has declined to accept the delegation. The Secretary has specified precisely the limited authorities retained by the federal government (47 Fed. Reg. 23437 (1982)):

> (a) The authority to administer all aspects of the natural gas outdoor lighting program where the appropriate State regulatory authorities have not accepted the delegation or where the delegation has been rescinded pursuant to 10 C.F.R. 516.32;
>
> (b) The authority to administer any aspect of the program where the appropriate State regulatory authority operating under the delegation indicates to [the Secretary] it is unable or incapable of administering; and
>
> (c) Any authority affecting natural gas outdoor lighting granted by future amendments or successor statutes to FUA, in which the Secretary of Energy is directed to perform specified activities, without there also being present an indication that Congress intended the delegation of the responsibility for such activity to the States or the reasonable latitude in the wording of the statute that would permit such an interpretation.

4. In the court below, petitioner raised broad constitutional challenges to the facial validity of Section 402.[3] Petitioner argued that Section 402 exceeds the constitutional power of Congress to regulate commerce and violates the

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[3]Petitions for review of the Secretary's regulations implementing Section 402 were also filed by Laclede Gas Company, the America Gas Association ("AGA"), and Entex, Inc. Those parties have not sought review in this Court, although AGA has filed a response supporting the petition.

Fifth and Tenth Amendments to the Constitution. For its Commerce Clause and Tenth Amendment arguments, petitioner relied primarily on this Court's decision in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). Petitioner's Fifth Amendment argument was essentially that the statute and regulations were unconstitutionally vague because compliance with the federal prohibitions against providing gas service for outdoor lighting might place distribution companies in violation of state laws regarding continuation of service. Without guidance—said to be lacking in the regulations—on how to comply with these assertedly conflicting obligations, petitioner contended, the statute and regulations were unworkable and void for vagueness.

5. The court of appeals considered and rejected petitioner's Commerce Clause and Tenth Amendment arguments. The court held that although the distribution of natural gas is essentially a local activity, it nevertheless has substantial ramifications for, and effects upon, interstate commerce (Pet. App. A-14 to A-17). The court also concluded that Congress had a rational basis for determining that the distribution of natural gas for use in outdoor lighting affects interstate commerce, relying on legislative history showing that even small savings of natural gas could benefit industries engaged in interstate commerce (*id.* at A-17 to A-18). Finally, the court held that Section 402's prohibitions were reasonably adapted to the goal of conserving natural gas (*id.* at A-18 to A-19).

Applying the test enunciated in *Hodel* v. *Virginia Surface Mining & Reclamation Association*, 452 U.S.C. 264, 287-288 (1981), the court of appeals also rejected petitioner's Tenth Amendment challenge. The court noted that the Fuel Use Act is not directed to the "States as States," but instead regulates the wholly private natural gas distribution industry. The court disagreed with petitioner's contention that the Secretary's delegation of his authority to the states

was mandatory; instead, the court found that the states "remain free to reject the delegation and thereby refuse to enforce the regulations." Pet. App. A-22. Thus, the court found coercion of the states to be lacking.

Finally, the court of appeals declined to consider petitioner's Fifth Amendment arguments, holding that, in the absence of a specific challenge to state regulations implementing the program, petitioner's claims of impermissible vagueness were not ripe. The court explained (Pet. App. A-24 to A-25):

> Congress and the Department of Energy clearly intended that the states be the primary regulators under the Fuel Use Act. Yet the petitioners in the present case challenge on due process grounds only the federal statute and implementing regulations, making no claim whatsoever regarding the vagueness of a particular state's regulatory program. * * *
>
> The petitioners claim that they are uncertain as to how they must comply with the prohibitions in Section 402 * * *. In our opinion the claim is not ripe. There is no allegation that a particular state has indeed enacted a set of vague and uncertain rules. Neither is there any claim that a state has or will pass regulations holding a gas distribution company liable retroactively for violations occurring prior to the promulgation of the state rule. Presumably, a state could without overstepping its powers to establish exemption criteria under the federal regulation concerning delegation, exempt all pre-promulgation violators, thus leaving parties such as the petitioners in this case with no injury in fact.

ARGUMENT

1. In this Court, petitioner does not challenge the court of appeals' rulings under the Commerce Clause and Tenth Amendment. Petitioner now disputes only the court of

appeals' decision that its claims of vagueness and unworkability were not ripe for adjudication. The court of appeals' decision on this point was clearly correct and does not, as petitioner alleges, conflict with this Court's decision in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967).

We note, preliminarily, that petitioner seriously misstates (Pet. 11) the holding of *Abbott Laboratories*. The Court there held that pre-enforcement review of agency regulations would be barred either if the relevant statutory scheme precluded such review (see 387 U.S. at 139-148), or if the controversy was not ripe for judicial resolution (see 387 U.S. at 148-156). In determining whether a controversy is ripe, the Court directed, attention is to be focused upon two factors: fitness of the issues for judicial decision in the current posture of the case, and any hardship to the parties of withholding consideration. 387 U.S. at 149. The Court plainly did not hold, as petitioner states, that pre-enforcement review must be allowed unless it is shown that the applicable statute precludes review as well as that the issues are ones unfit for judicial review and that the regulations had no direct impact upon the challenging party. Because the court of appeals below held that the claim presented by petitioner is unripe, petitioner's argument (Pet. 11, 15) that the statute specifically authorizes pre-enforcement review is beside the point. As the Court made clear in *Abbott Laboratories* (387 U.S. at 148), lack of ripeness and statutory preclusion are independent barriers to review. The Court's discussion of ripeness, moreover, squarely supports the decision of the court of appeals below.

In *Abbott Laboratories*, the regulation held to be ripe for pre-enforcement review was complete unto itself, requiring drug manufacturers immediately to change their labeling practices or risk noncompliance with the regulation. See 387 U.S. at 151-154. Here, by way of contrast, petitioner has

never brought before any court facts sufficient to determine the impact of the federal service prohibition regulations on petitioner's operations. The impact of those regulations remains completely unknown in the absence of any information about the implementing program of the State of Georgia.[4] Petitioner is not threatened with *federal* enforcement action because the Secretary's enforcement responsibilities have been delegated to the State of Georgia, and the Secretary did not retain residual or dual enforcement authority at the federal level.[5] Only in the event that the delegation to Georgia is at some time in the future rescinded is it even possible that petitioner might be faced with federal prosecution. And petitioner does not suggest, nor is it plausible to assume, that any future reversion of authority to the federal government would result in federal prosecution for violations that occurred during the time the delegation was in effect.[6]

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[4]Petitioner, by its own description, is "a local distribution company with its principal place of business in Atlanta, Georgia. Atlanta Gas serves about 770,000 customers in the State of Georgia and is subject to regulation by the Georgia Public Service Commission." Brief of Joint Petitioners Atlanta Gas Light Co., Nos. 79-2568 *et al.*, filed in the court below, at page 3. Thus, it is of no legitimate concern to petitioner that the Texas Railroad Commission has declined to accept the Secretary's delegation (Pet. 10).

[5]In its brief in support of the petition, the American Gas Association argues that the statute does not authorize the Secretary to delegate his enforcement responsibilities to the states. Since the issue is not raised by petitioner, the Court need not consider it. It is ironic indeed for AGA to advance this argument in light of its comments on the Secretary's rulemaking: "A.G.A. supports the delegation of authority to establish enforcement policies and assess civil penalties to the States" (R. 70; "R." denotes the administrative record filed in the court of appeals).

[6]The remoteness of any possibility of federal enforcement here distinguishes *Abbott Laboratories*. There the Court concluded that the requirement that any enforcement action under the Food and Drug Administration regulations at issue proceed through the offices of the Attorney General did not meaningfully shield persons subject to the

As for the "threat" of state prosecution, the court of appeals was surely correct in declining to decide the constitutionality of a state program about which it had no information. Petitioner has never alleged that Georgia has adopted unreasonable enforcement policies or has in any way threatened enforcement action against petitioner. For that matter, petitioner does not even reveal whether it has ever applied to the Georgia authorities for exemptions from the service prohibitions that might, if granted, significantly alter the effect of the statute's prohibitions on petitioner's business operations. Without such information, any decision by the court of appeals could be no more than an ill-informed advisory opinion. The court of appeals' refusal to be drawn into such a speculative dispute does not merit review by this Court; it is fully consistent with this Court's decision in *Abbott Laboratories*. Moreover, unlike the situation in *Abbott Laboratories*, which involved only the question of a regulation's consistency with the underlying statute, petitioner here seeks resolution of *constitutional* questions in a factual vacuum. This Court's decision in *W.E.B. DuBois Clubs* v. *Clark*, 389 U.S. 309, 311-313 (1967), and *Poe* v. *Ullman*, 367 U.S. 497 (1961) (opinion of Frankfurter, J.), *id.* at 509 (opinion of Brennan, J.), fully support the court of appeals' refusal to undertake such a premature constitutional adjudication.

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regulations from the direct impact of the regulations, because there was no suggestion that the Attorney General would fail to seek criminal and civil sanctions for violations of the regulations. 387 U.S. at 151-152. The Court also stressed that the "agency does have direct authority to enforce th[e] regulation" challenged in administrative proceedings. Here, by contrast, the Secretary of Energy has, under the very regulations challenged, transferred his full authority and responsibility with regard to natural gas outdoor lighting entirely outside the federal government; the division of authority effected plainly is not a "mere technicality." Compare *Abbott Laboratories, supra*, 387 U.S. at 152.

2. In any event, petitioner's due process challenge to the statute and federal regulations has no merit. Petitioner contends that the absence of enforcement or compliance guidelines forces a gas distribution company to choose between obeying the statutorily-mandated prohibitions against service and violating unspecified state laws that allegedly prohibit the termination of service. But federal compliance guidelines are neither constitutionally nor statutorily required.

Any federal law that regulates conduct that is also within the province of permissible state regulation raises the possibility that the persons affected will be confronted with conflicting state and federal mandates. To the extent that any conflict is, in fact, irreconcilable, it is also certain, under the Supremacy Clause, that the state law cannot be enforced. *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525-526 (1977); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963). Congress is not constitutionally bound, however, to determine, before it enacts any law, each and every respect in which its enactment might contradict the law of a state and how every conflict is to be resolved. Indeed, it is beyond the power of Congress—and surely of the Secretary of Energy—to do so. "Congress is vested with the legative power of the United States, and not the judicial power * * *." *Arizona Public Service Co.* v. *Snead*, 441 U.S. 141, 151 (1979) (Rehnquist, J., concurring).

Contrary to petitioner's contentions (Pet. 13-15), it is hardly self-evident, and the record of this proceeding surely does not establish, that natural gas distributors are required by Section 402 to do the physically or legally impossible. Petitioner does not deny that there are gas lights on the companies' side of gas meters as to which the petitioner has full control, and natural gas companies enjoy easements that may enable them to accomplish what Section 402

requires. Section 402 is not invalid because hypothetical cases exist in which enforcement would be problematic. And there has been no showing that the states lack the ability to adapt their regulatory and enforcement programs to the realities of utility service. Indeed, the expansive delegation of authority to the state authorities no doubt rests upon Congress' belief that they were best equipped to make such accommodations as might be necessary. See H.R. Rep. No. 95-1749, 95th Cong., 2d Sess. 89 (1978). The public utility regulatory agencies are assuredly better situated to make such judgments than the court of appeals, or this Court. Because the challenged regulations do not authorize enforcement prior to establishment of a state regime for implementing the Act, petitioner is not, so far as the record shows, subject to any prospect of enforcement of impermissibly vague obligations. Plainly there can be no constitutional requirement for the promulgation of a federal enforcement policy in these circumstances.

Nor does the statute itself require promulgation of enforcement guidelines. With respect to the outdoor lighting prohibitions, Section 402 specifically sets forth the matters that the Secretary might treat in the regulations he issues under that section: certain prohibitions under Section 402(b)(1) and (2), and certain exemptions under Section 402(b)(3). Neither Section 402, nor Section 723(c), 42 U.S.C. (Supp. IV) 8433(c), which provides civil penalties for violations of Section 402, requires that the Secretary issue general guidance concerning the relationship of state and federal law.

Petitioner would extract a duty to issue enforcement guidelines from the language of the conference report, H.R. Rep. No. 95-1749, *supra*. The report states (*id.* at 89):

> The conferees intend that the Secretary's enforcement of civil penalties be reasonable. For instance, lights that are located on the users [*sic*] side of the meter, and are not visible from the street present problems to a company in enforcing the ban. Similarly, a light that was turned off by the company, and later reconnected by the residential user may be difficult to detect. The Secretary should provide some guidelines.

Although this language surely indicates the conferees' policy view that "some guidelines" are desirable, it falls far short of establishing a statutory duty to issue particular federal guidelines. Congress conspicuously omitted the requirement for guidelines from the Fuel Use Act and, in contrast to the specific requirements of Section 402, the general exhortation in this passage does not clearly describe what, if anything, is expected of the Secretary.

The Act leaves the Secretary discretion to determine whether, and in what form, enforcement guidelines would be appropriate. In deciding not to issue guidelines for the time being, the Secretary could legitimately consider that only one regulatory authority in the nation has declined his delegation, that no other state has requested guidelines, that at least 21 states already had outdoor lighting programs, including enforcement procedures, in effect at the time when the Secretary promulgated his regulations, and that the legislative history of the Fuel Use Act itself provides general guidance with respect to the assertedly problematic cases with which petitioner is concerned.[7] The conference

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[7]Nothing in the legislative history upon which petitioner relies suggests that, in the event that administration of the outdoor gas lighting program was delegated to the states, enforcement policy should nonetheless be supplied by the Secretary. Significantly, the National Association of Regulatory Utility Commissioners (NARUC) testified before the Department of Energy that "[t]he fair and equitable administration

report, as quoted above, stated in connection with such cases, "The conferees intend that the Secretary's enforcement of civil penalties be reasonable." Senate floor debate on the conference report provides even more concrete evidence concerning the steps that gas companies are expected to take toward compliance, and the enforcement policy that Congress anticipated. See 124 Cong. Rec. 21119-21120 (1978) (colloquy between Senators Danforth and Ford). The Secretary accordingly had discretion to determine that, in view of the highly varied circumstances to which enforcement guidelines would have to apply in the states, no formal federal guidelines are now required.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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and enforcement of this program is best accomplished by the State Utility Commissions—agencies which are acutely aware of the conflicting interests that will result from this program" (R. 338).